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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

RACHEL GASSO, on behalf of herself and all consumers similarly situated, Plaintiffs, v. ALLSTAR MARKETING GROUP, INC., ALLSTAR MARKETING GROUP, LLC, ALLSTAR MARKETING CORP., and DOES 1-25, inclusive, Defendants.	CASE NO. 3:07-cv-02235 BTM (BLM) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR REMAND TO STATE COURT AND MOTION FOR COSTS **[Per chambers, no oral argument unless requested by the Court]** Hearing Date: January 25, 2008 Time: 11:00 a.m. Dept.: Courtroom of the Honorable Barry Ted Moskowitz

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INTRODUCTION

Plaintiffs move to remand the instant action to the Superior Court of California, County of San Diego, pursuant to 28 U.S.C. § 1447. Plaintiffs further move for costs against defendants pursuant to 28 U.S.C. § 1447(c), as defendants' foundation for removal is, in its essence, that Plaintiffs may amend the Complaint in the future, a clearly improper criteria.

I. BACKGROUND

1. As required by California law, on August 27, 2007, Plaintiffs' counsel sent a pre-litigation letter to the President of Allstar Marketing Group, LLC outlining its violations of California Civil Code § 1750, *et seq.* (the Consumer Legal Remedies Act). Specifically, Allstar Marketing Group, LLC was informed of its illegal marketing of the product "Auto Cool" pursuant to the Act and duly advised that pursuant to the California Civil Code, Allstar Marketing Group, LLC must agree to provide the aggrieved parties the appropriate remedies within 30 days of receipt of the correspondence or face a lawsuit. *See* Correspondence dated August 27, 2007, attached to the Declaration of Lee T. Patajo, Esq. as Exhibit 1.

2. On September 24, 2007, Allstar Marketing Group, LLC's counsel forwarded correspondence that stated that Allstar was unaware of any misrepresentation or deceptive representation with respect to the Autocool product and saw "no reason to agree to the injunctive relief, refunds, and other relief demanded." *See* Correspondence dated September 24, 2007, attached to Declaration of Lee T. Patajo, Esq. as Exhibit 2.

3. On or about October 26, 2007, Plaintiff Rachel Gasso, on behalf of herself and "the California general public" served upon the Defendants a summons and complaint, which were filed in the Superior Court of the State of California, County of San Diego, on October 17, 2007. *See* Complaint, ¶ 11, attached to Declaration of Lee T. Patajo, Esq. as Exhibit 3.

4. This instant action is a civil consumer protection action based on violations of California law, namely the Unfair Competition Law (California Business and Professions Code §§ 17200 *et seq.*), the False Advertising Law (California Business and Professions Code §§ 17500 *et seq.*), and the

Consumer Legal Remedies Act (California Civil Code §§ 1750 *et seq.*). Plaintiffs expressly have not subjected defendants to any substantive claims based on federal law. *See* Complaint, ¶ 6, attached to Declaration of Lee T. Patajo, Esq. as Exhibit 4.

5. Plaintiff Rachel Gasso is a resident of California, specifically the County of San Diego. The putative Plaintiff Class is limited to aggrieved purchasers of AutoCool in California. The following table, which provides the full text of paragraphs 6 and 11 of Plaintiff's Complaint (attached to Declaration of Lee T. Patajo, Esq. as Exhibit 3), is demonstrative of Plaintiff's express intent to limit the parameters of this consumer class action to California only:

Paragraph 6 (Emphasis added.)	Paragraph 11 (Emphasis added.)
Representative Plaintiff Gasso is, and at all times herein mentioned, a resident of the County of San Diego, who, during the relevant period, purchased Auto Cool for her own use and not for resale. Plaintiff used the product as directed, and it did not work as advertised. **The damages or losses as to Plaintiff individually do not exceed $75,000.00, however calculated, and the aggregate damages are less than $5,000,000, and no federal questions are asserted herein.**	Pursuant to Civil Code § 1780 and Business and Professions Code § 17200 *et seq.*, Plaintiff brings this action individually and **on behalf of the California general public.**

Accordingly, Plaintiff makes clear in the Complaint that she is representing California consumers only.

6. Defendants removed the action on November 27, 2007, from San Diego Superior Court to this Court. The basis for Defendants removal is that the amount in controversy exceeds $5,000,000 and thus there is federal jurisdiction under CAFA's amount in controversy rules. Since Plaintiff specifically pled aggregate damages under $5,000,000, then, pursuant to the *Lowdermilk* doctrine, Defendant was required to submit evidence showing to a legal certainty that damages exceeded such amount.

7. Unable to do so for plaintiffs' California class, Defendant submitted a declaration showing the potential damages and the amount at issue **if** Plaintiff had pled a national class.[1] But, as shown above, Plaintiff only brought the action on behalf of the California general public. (Complaint, ¶ 11). If there were any doubt as to Plaintiff's present intention to seek relief only as to California, it is dispelled in ¶ 12 of the Complaint:

"Plaintiff reserves the right to amend this Complaint for such a national class."

8. Accordingly, Defendant appears to have intentionally misconstrued the Complaint in order to delay this case and increase the costs of litigation. In fact, as evidence of bad faith, defendant recognizes in its Notice of Motion and Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted, attached to the Declaration of Lee T. Patajo, Esq. as Exhibit 6, that the violations alleged have no force and effect outside of California, citing Norwest Mortgage, Inc. v. Superior Court, 72 Cal.App.4th 214, 222, 85 Cal.Rptr.2d 18. (*See* Defendant's Notice of Motion and Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted, p. 3, lines 11-13, attached to the Declaration of Lee T. Patajo, Esq. as Exhibit 6.) Yet Defendants argue out of the other side of their mouth and declare nationwide damages of $14,593,092 in order to improperly remove and delay this case. An award of fees and costs is appropriate and Plaintiff will submit an itemized bill within 15 days of the Court's Order.

II. ARGUMENT

A. REMAND IS PROPER WHEN A DISTRICT COURT LACKS SUBJECT MATTER JURISDICTION.

1. Federal subject matter jurisdiction is limited to the provisions codified by statute.

Federal courts, as courts of limited jurisdiction, strictly construe their jurisdiction. Lowdermilk v. United States Bank National Ass'n, 479 F.3d 994, 998 (9th Cir. 2007). Unlike California state courts, federal courts are not vested with inherent or general subject matter jurisdiction. Federal courts are empowered with the authority to adjudicate only the cases that the United States Constitution and

[1] Defendant declares nationwide sales of $14,593,092; but California sales are estimated at only $1,780,357, far below the $5,000,000 threshold. (*See* Declaration of Lee T. Patajo, Esq., ¶12)

Congress authorize them to adjudicate, namely cases involving a federal question, those to which the United States is a party, or those meeting the stringent requirements for diversity of citizenship. Furthermore, it is presumed that a cause lies outside federal jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction. Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377, 114 S. Ct. 1673 (1994). "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c) (West 2007). Moreover, lack of subject matter jurisdiction is never waived and may be raised by either party or the court at any time. Attorneys Trust v. Videotape Computer Products, Inc., 93 F.3d 593, 594-95 (9th Cir. 1996).

2. Federal subject matter jurisdiction under CAFA is limited to those claims in which the amount in controversy exceeds the sum or value of $5,000,000.

Appropriate federal subject matter jurisdiction for class actions is governed by the Class Action Fairness Act, codified at 28 U.S.C. § 1332(d)(2):

> **(2)** The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—
> **(A)** any member of a class of plaintiffs is a citizen of a State different from any defendant;
> **(B)** any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or
> **(C)** any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state. 28 U.S.C. § 1332(d)(2) (West 2007).

Defendant has filed its Notice of Removal Action based on the fact that it perceives (erroneously) that plaintiffs' amount in controversy exceeds the sum or value of $5,000,000. Plaintiffs have appropriately filed this Motion to Remand herewith, and for the reasons stated below, have demonstrated that defendant's evidence actually proves an amount in controversy under $5,000,000.

3. Defendant has the burden of demonstrating that the amount of controversy exceeds $5,000,000.

It is well established that the plaintiff is "master of the complaint" and can plead to avoid federal jurisdiction. Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826, 831, 122 S. Ct. 1889, 153 L.3d.2d 13 (2002). Accordingly, subject to a "good faith" requirement in pleadings, a plaintiff may sue for less than the amount she may be entitled to if she wishes to avoid federal jurisdiction and remain in state court. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-89, 58 S.Ct. 586, 82 L.Ed. 845 (1938).

Where the plaintiff has alleged her facts and pled her damages, and there is no evidence of bad faith, the defendant must not only contradict the plaintiff's own assessment of damages, but must overcome the presumption against federal jurisdiction. *See* St. Paul Mercury Indem. Co., 303 U.S. at 288-291. The party seeking removal must prove with "legal certainty" that the amount in controversy is satisfied. Lowdermilk, 479 F.3d at 996.

Moreover, "Defendant's right to remove and plaintiff's right to choose his forum are not on equal footing; for example, unlike the rules applied when plaintiff has filed suit in federal court with a claim that, on its face, satisfies the jurisdictional amount, removal statutes are construed narrowly; where plaintiff and defendant clash about jurisdiction, uncertainties are resolved in favor of remand." Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir. 1994) (citing Boyer v. Snap-on Tools Corp., 913 F.2d 108 (3rd Cir. 1990).

4. Propriety of removal is based on the current complaint, and future amendments are irrelevant.

It is bedrock law that the fact that a plaintiff may amend the Complaint in the future is completely irrelevant to the propriety of a current removal. The Ninth Circuit recently reiterated:

> We have long held that post-removal amendments to the pleadings cannot affect whether a case is removable, because the propriety of removal is determined solely on the basis of the pleadings filed in state court. *See Sparta Surgical Corp. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 159 F.3d 1209, 1213 (9th Cir. 1998); *O'Halloran v. Univ. of Wash.*, 856

F.2d 1375, 1379 (9th Cir. 1988). Williams v. Costco Wholesale Corp., 471 F.3d 975 (9th Cir. 2006)

Since plaintiff made clear she is seeking relief on behalf of California citizens only; defendant's nationwide statistics are irrelevant.

B. DEFENDANT CANNOT UPHOLD ITS BURDEN IN DEMONSTRATING WITH LEGAL CERTAINTY THAT THE $5,000,000 AMOUNT IN CONTROVERSY IS MET, AND THUS, ITS REMOVAL IS FATALLY DEFECTIVE.

1. A defendant must prove with "legal certainty" that the amount in controversy exceeds $5,000,000 in order to demonstrate that removal is appropriate.

When a plaintiff has pled damages less that the jurisdictional amount under CAFA, the party seeking removal must prove with legal certainty that the amount in controversy is satisfied, notwithstanding the prayer for relief in the complaint. Lowdermilk, 479 F.3d at 996. The starting point of the analysis of whether there is a specific damages amount pled is "whether it is 'facially apparent' from the complaint that the jurisdictional amount is in controversy." Abrego Abrego, 443 F.3d at 690 (quoting Singer v. State Farm Mut. Auto Ins. Co., 116 F.3d 373, 377 (9th Cir. 1997)). It is appropriate to review the four corners of the complaint to determine whether the CAFA jurisdictional amount is met, and when Plaintiff avers that damages are less than five million dollars, Plaintiff pleads "a specific amount in damages," and the preponderance of the evidence standard does not apply. Lowdermilk, 479 F.3d at 998. The appropriate standard to be invoked is the legal certainty standard. *Id.* at 996. In the instant case, plaintiffs have averred damages less than five million dollars: "The damages or losses to Plaintiff individually do not exceed $75,000, however calculated, and the aggregate damages are less than $5,000,000, and no federal questions are asserted herein." (Complaint, ¶ 6). There is no doubt that Plaintiffs have pled damages less than $5,000,000. The Complaint reflects this fact **on its face.**

Case law is unequivocal in stating that mere speculation as to future additional damages is insufficient to support removal jurisdiction now. *See* Burns v. Windsor Ins. Co., 31 F.3d at 1097 ("The possibility that plaintiff may in the future seek or recover more damages is insufficient to support removal jurisdiction now.") As is clear on the face of plaintiff's Complaint, plaintiffs have expressly limited the damages sought in unequivocal terms and expressed mere speculation as to certification of a nationwide class. Because plaintiffs have expressed their damages to be less than the jurisdictional amount, defendant must prove to a legal certainty that the jurisdictional amount is met. Lowdermilk, at 996.

Defendant attempts to evade the Lowdermilk standard when it makes a coy assertion that it is uncertain whether the preponderance of the evidence standard or the legal certainty standard applies. Defendant refers to the Prayer for Relief to somehow create ambiguity in Plaintiff's clearly stated intentions in paragraphs 6, 11 and 12. In the face of the language of paragraph 6 ("aggregate damages are less than $5,000,000'), paragraph 11 ("Plaintiff brings this action individually and on behalf of the California general public") and paragraph 12 ("Plaintiff reserves the right to amend for such national class...". Defendant asserts that plaintiffs failed to plead damages because the proposed relief for the California class under California law somehow encompasses a nationwide putative class. If we accept this line of thought, defendant believes the preponderance of the evidence standard should govern.

Plaintiffs have made their intentions clear and have not "amended" the complaint to encompass a national class, however defendant appears willing to suggest that plaintiff is currently attempting to certify a national class:

> It is thus uncertain whether, in determining whether the $5,000,000 jurisdictional threshold of § 1332(d)(2) is met, the test to be applied is the "preponderance of the evidence" test set forth in *Abrego Abrego v. Dow Chemical Co.*, 443 F.3d 676, 683 (9th Cir. 2006) (where plaintiff fails to plead a specific amount of damages, the defendant seeking removal must prove by a preponderance of evidence that the amount in

> controversy has been met), or the "legal certainty" test set forth in *Lowdermilk v. United States Bank National Ass'n*, 479 F.3d 994, 999-1000 (9th Cir. 2007) (where a plaintiff in good faith pleads an amount in controversy of less than $5,000,000, the party seeking removal must prove with legal certainty that CAFA's jurisdictional amount is met). (Defendant's Notice of Removal, ¶ 10).

As will become clear, defendant is masterful in the art of extrapolation. If we are to take defendant's inference at face value, defendant's interpretation of the Prayer for Relief, i.e. Plaintiffs seek "all monies...", apparently vitiates the express and specific language of paragraphs 6, 11, and 12. From the apparent absence of more qualifying terms in the Prayer for Relief, defendant makes the leap to the preponderance of the evidence test.

Reading the complaint as a whole and its parts in their context as well as giving the complaint a reasonable interpretation, the supposed "all monies" characterization provided by defendant does not usurp plaintiff's previous statement that the amount in controversy does not exceed $5,000,000. If any inference is made, it should be made to be consistent with the statements articulated in paragraphs 6, 11, and 12.

The preponderance of the evidence standard only operates when a plaintiff does not plead damages, a fact scenario that is not present in this instant case. As the Ninth Circuit articulated in Lowdermilk case, the preponderance of the evidence standard stated in Abrego Abrego is limited to the situation where the plaintiff fails to plead a specific amount of damages. Lowdermilk, 479 F.3d at 998. Plaintiff has made her intentions clear: (1) all claims are based on California law; (2) the complaint is filed for the protection of California citizens; and (3) aggregate damages are less than $5,000,000.

2. Defendant has not even demonstrated by a preponderance of the evidence that the jurisdictional requirement is met because (1) Henny Karrenman's statements take an illogical leap and inferentially attribute non-California citizens to the instant action, and (2) the evidence upon which defendant relies is unreliable and cannot support a finding of subject matter jurisdiction.

a. Defendant's reliance on Henny Karreman's Declaration is misplaced because its statistical analysis is inherently flawed.

Henny Karreman, Chief Financial Officer of Allstar Marketing Group, LLC, has determined that the value of plaintiff's claim for restitution is in excess of $14.5 million. Henny Karreman reviewed records pertaining to the direct response sales of Auto Cool products from inception of the sale of Auto Cool and stated, under penalty of perjury, that for the aforementioned period of time and limited to sales made to addresses in the **United States**, net of returns, Allstar's revenues from consumer purchases in the direct response channel (including shipping and handling) totaled $14,458,746 and an additional $134,346 in sales taxes were collected from direct response customers. Henny Karreman concludes that the value of plaintiff's restitution claim is at least $14,593,092. (Notice of Removal, ¶ 6, Emphasis added). The $14,593,092 figure is utilized to support the position articulated in the Notice of Removal:

> To assist the Court in determining that subject matter jurisdiction exists over this action under CAFA, even if the *Lowdermilk* standard is applied, Allstar is submitting herewith as Exhibit B the Declaration of its Chief Financial Officer, Henny Karreman. This Declaration sets forth facts which establish to a legal certainty that the value of Plaintiffs' claim for restitution is in excess of $14.5 million, and therefore CAFA's jurisdictional amount is met." (Notice of Removal, ¶ 11).

Although plaintiffs have not had the luxury of a first-hand review of the statistics and the information and representations upon which they rely, plaintiffs can state with confidence that reliance on this $14.5 million dollar figure is clearly problematic. First, the figure represents the sales made to addresses in the United States and not solely in California. Auto Cool, a New York corporation, has made no statement that all of its sales are in California, and therefore, at a minimum, the statistic provided is misleading. Defendant has been crafty its use of an unqualified statistic to extrapolate support of its claim of CAFA jurisdiction.

In utilizing the $14.5 million statistic, Defendant has implicitly and prematurely extended the putative class to the entire United States. Nowhere in the Complaint is it articulated that plaintiffs include individuals from all throughout the United States. Defendant improperly elevates the reservation of a right to a future amendment articulated in plaintiff's paragraph 12 and the supposed ambiguity in the Prayer for Relief to indisputable and binding fact in support of its Notice of Removal.

The statistics provided by Mr. Karreman are without ample justification and are thus flawed. Illustrative of the flaws of Mr. Karreman's statistical analysis is the fact California has a population of 36,457,549 or approximately 12.2% of the estimated 299,398,484 people in the United States (2006).[2] One could reasonably assert that since California is 12.2% of the total United States population, its total consumer sales should be related, if not proportional, to its population. Given this reasonable assertion and defendant's representation that its national sales total $14,593,092, 12.2% of this figure is $1,780,357.23, well below the requisite $5,000,000 threshold. *See* Exhibit 5 to Declaration of Lee T. Patajo, Esq.

Defendant has either (1) clumsily given credence to an overreaching statistic to support its Notice of Removal, or (2) artfully crafted a fictional fact scenario from a conditional statement in Plaintiff's Complaint upon which it will prevail, or (3) intentionally failed to provide information qualifying its statistical reliance. While we are left to speculate as to defendant's motivations, the fact remains that defendant's spotty evidence cannot meet either the legal certainty standard or the preponderance of the evidence construction. What we may and should conclude is that defendant's evidence in support of the Notice of Removal is inadequate.

b. The evidence upon which defendant relies is unreliable and cannot support a finding of subject matter jurisdiction.

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[2] *See* Declaration of Lee T. Patajo, Esq., Exhibit 5,United States Census Bureau, State and County Quick Facts page re: California *at* http://quickfacts.census.gov/qfd/states/06000.html.

Upon deconstructing defendant's loose statistical analysis, defendant is left with vague, ambiguous, and baseless evidence at best. The declaration is replete with hearsay, violates the best evidence rule, and includes no primary source documents. When stripped to its essence and taken in the context of the instant litigation, the utility of the $14.5 million statistic articulated by Henny Karreman, under penalty of perjury, is without explanation and is merely an utterance of speculation without further support. Such evidence cannot rise to the appropriate "legal certainty" standard, nor would it satisfy the inapplicable standard of the preponderance of the evidence.

C. PLAINTIFF IS ENTITLED TO COSTS PURSUANT TO 28 U.S.C. § 1447(c).

Plaintiff seeks an award of fees under 28 U.S.C. § 1447(c), which provides that:

> "[a]n order remanding the case may require payment of just costs and actual expenses, including attorneys fees, incurred as a result of the removal."

Such an award is within the Court's discretion. *See* Suder v. Blue Circle, Inc., 116 F.3d 1351, 1352 (10th Cir. 1997). Because the Court has found that removal is improper, the Court does not need to find that defendants acted in bad faith in order to award fees and costs. Suder, 116 F.3d at 1352. Fees should be awarded in this case to compensate plaintiff for the time and resources expended in remedying Allstar Marketing Group, LLC's improper removal. *See* Moore v. Kaiser Found. Hosps. Inc., 765 F.Supp. 1464, 1466 (N.D. Cal. 1991).

> The purpose of such an award is not to punish defendants but rather to reimburse plaintiffs for unnecessary litigation costs inflicted by defendants. See Moore v. Kaiser Foundation Hospitals, Inc., 765 F.Supp. 1464, 1466 (ND Cal 1991).

Defendant's arguments for removal are unimpressive and are a thinly veiled attempt at incurring excess costs and delaying relief to the aggrieved plaintiff and plaintiff class. For the reasons stated above, defendant does not offer any objectively reasonable basis for seeking removal.

Even though not required, defendants bad faith is evident from their pleadings and lack of evidence. If defendant were truly uncertain about the scope of plaintiffs' claims, a telephone call could have solved this issue. Plaintiffs would surely have clarified any ambiguity that defendant perceived via stipulation. Instead, defendant chose to waste attorney time and the costs, the court's time, and further burden an already burdened federal judiciary, in a clear effort to delay and increase expenses. Costs should be awarded. See e.g., Williams v. Phillip Morris Inc., No.C-02-1170VRW (N.D.Cal. 2002). (Plaintiff awarded costs and ordered to submit itemized bills within 15 days of order).

III. CONCLUSION

For the reasons stated above, plaintiff respectfully request that this court grant plaintiff's Motion to Remand the instant to the Superior Court of California, County of San Diego and that costs, including attorney's fees, be awarded, as appropriate.

Respectfully submitted,

LAW OFFICES OF ALEXANDER M. SCHACK

Dated: December 17, 2007

"s/Alexander M. Schack"
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